Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	EB Docket No. 04-296
Review of Emergency Alert System	)	

OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION OF PANAMSAT CORPORATION, SES AMERICOM, INC., AND INTELSAT, LTD.

EchoStar Satellite L.L.C. ("EchoStar") hereby opposes the petition filed on December 27, 2005 by PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd. ("Petitioners"). The Petitioners request partial reconsideration of the Commission's order requiring Direct-To-Home ("DTH") Fixed Satellite Service ("FSS") satellite operators to participate in the national emergency alert system ("EAS").[1]

Petitioners assert that the Commission should amend its EAS Order to apply EAS obligations only to DTH service providers rather than the DTH-FSS licensees.[2] The Commission should reject this plea out of hand for three reasons. *First*, the Petition relies on facts some of which do not appear to have been fully presented to the Commission in the proceeding below.[3] *Second*, the

[1] Petition for Partial Reconsideration of PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd., *filed in* EB Docket No. 04-296 (filed Dec. 27, 2005) ("Petition for Reconsideration").

[2] *Id.* at 4-10.

[3] *See* 47 C.F.R. § 1.429(b).

Commission has considered this precise issue -- whether a public interest obligation should be shouldered by the satellite licensee or the service provider -- in the public interest programming proceeding. There, the Commission decided that the obligation should be borne by the licensee, who is free of course to seek to delegate it contractually to the service provider. Two of the present Petitioners requested reconsideration of that decision too, and the Commission denied that request. Literally, the Petitioners are going through the same motions on essentially the same issue. Indeed, despite the Petitioners' arguments, this proceeding is distinguishable from the public interest programming proceeding only in the sense that the Commission's decision is even more solidly founded in this case.

Third, the Petitioners are requesting a rule that the Commission will lack the jurisdiction to enforce. The jurisdiction to regulate DTH service providers cannot be conjured up either based on the serendipitous event that some lessees of FSS capacity are Commission licensees in their own right, or on the fanciful idea of regulating receive-only dishes as suggested by the Petitioners.

I. DISCUSSION

The Commission's EAS Order, released on November 10, 2005, stated in relevant part: "For purposes of this Order, DBS providers include the entities set forth in section 25.701(a) of our rules."[4] In turn, that section defines DBS providers to include "[e]ntities licensed to operate satellites in the Ku band fixed satellite service and that sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent

[4] *Review of the Emergency Alert System,* First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 18625, ¶ 49 (2005) ("EAS Order").

of the total applicable programming channels yields a set aside of at least one channel of non commercial programming."[5]

Procedural Defect. Under the Commission's rules, 47 C.F.R. § 1.429(b), a petition for reconsideration that relies on facts not previously presented to the Commission will only be granted in certain circumstances. Many of the facts asserted in the Petition (such as the assertion that DTH-FSS operators will have to assume significant burdens in order to enforce the Commission's rules[6]) do not appear to have been fully presented to the Commission. None of the circumstances for excusing that failure obtains here, and the Petitioners have not even tried to make the relevant showing.

Notably, the Petitioners failed to file comments or reply comments below even though the question of who should bear the proposed EAS obligation is a fundamental one. Nor can the Petitioners justify that failure by claiming to have somehow been taken by surprise. The Commission did not break any new ground; it did not resolve this question in a radical way. To the contrary, the Commission followed its precedent. It imposed the public interest obligations at issue in this proceeding on the Commission licensees -- the same entities that it had previously charged with fulfilling a similar set of obligations. Indeed, the Commission did not even enunciate a new rule -- it incorporated by reference its existing rule on the subject.[7] While all three Petitioners made ex parte

[5] 47 C.F.R. § 25.701(a).

[6] Petition for Reconsideration at 6-8.

[7] EAS Order at ¶ 49 ("For purposes of this Order, DBS providers include the entities set forth in section 25.701(a) of our rules.").

presentations to the Commission,[8] these (at least in the case of PanAmSat) appear to have been perfunctory and not to have touched on many of the facts asserted in the Petition.[9]

The Public Interest Programming Precedent. The Petitioners acknowledge, as they must, that the Commission has already addressed the distinction between licensees and service providers in the public interest programming proceeding.[10] There, the Commission ruled that Section 335 of the Communications Act "should be interpreted as imposing on the satellite licensee the ultimate responsibility for complying with the statutory public service obligations."[11] In doing so, it rejected arguments made by GE American Communications, Inc., SES's predecessor, and others.[12] The Commission explained that it has "greater ownership information about satellite licensees than it has over unlicensed direct-to-home distributors," and that "efforts to assert jurisdiction over programming suppliers and other non-licensees could involve the Commission in litigation over its regulatory authority."[13]

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[8] EAS Order, Appendix A.

[9] *See* Letter from Joseph A. Godles, Attorney for PanAmSat Corporation, to Marlene H. Dortch, Secretary, FCC, dated Oct. 21, 2005 ("Operators of Fixed Satellite Service ('FSS') space stations that are used to provide direct-to-home ('DTH') services do not control the content of the DTH services, and therefore are not in a position to implement an Emergency Alert System ('EAS') in connection with the DTH services."). EchoStar has been unable to locate the notices for the ex parte presentations apparently made by SES Americom and Intelsat.

[10] Petition for Reconsideration at 6 n.10.

[11] *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations*, Report and Order, 13 FCC Rcd 23254, ¶ 21 (1998) ("Public Interest Order"); *affirmed in Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations*, Report and Order, 19 FCC Rcd 5647, at ¶ 14 (1998) ("Public Interest Second Reconsideration Order").

[12] Public Interest Order at ¶ 21.

[13] *Id.* at ¶ 23.

On reconsideration of that decision, the Commission rejected the arguments of GE Americom[14] and PanAmSat[15] that they have no control over the programming that is provided by their DTH lessees and therefore cannot affect the programming provided to U.S. subscribers.[16] In denying these petitions, the Commission reasoned, again: "imposing the public interest obligations on the FSS Part 25 licensee facilitates enforcement of the requirements, as the Commission's enforcement authority over non-licensees is more limited."[17]

The Petitioners try to distinguish that proceeding in a footnote.[18] A close look at the Commission's reasoning, however, shows that the only meaningful difference between the two proceedings points even more emphatically in the direction favored by the Commission. While Petitioners are correct that the Commission's analysis in the public interest proceeding was focused on Section 335 of the Communications Act and no such directive exists here, the lack of such a directive points to the opposite result for that desired by Petitioners.[19]

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[14] Petition for Reconsideration of GE American Communications, Inc., *filed in* MM Docket No. 93-25 (filed Mar. 10, 1999).

[15] Petition for Reconsideration of PanAmSat Corporation, *filed in* MM Docket No. 93-25 (filed Mar. 10, 1999).

[16] Public Interest Order at ¶ 25 ("We do not agree with commenters who contend that Part 25 licensees should be treated differently than Part 100 licensees because Part 25 licensees have less control over programming. As we noted with respect to Part 100 licensees, the Part 25 licensee can delegate responsibility for Section 335 requirements, but we will hold the Part 25 licensee ultimately responsible for compliance.").

[17] Public Interest Second Reconsideration Order at ¶ 10.

[18] Petition for Reconsideration at 6, n.10.

[19] 47 U.S.C. § 335.

This is because Section 335 specifically directed the Commission to impose its requirements on "provider[s] of direct broadcast satellite service."[20] The statute also provided a specific definition of that term: "(i) a licensee for a Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations; or (ii) any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations."[21]

Under this two-pronged definition, more of a case could be made for looking at the ultimate service provider than here. Indeed, one of the main arguments advanced to the Commission by the Petitioners' allies on that issue was that Section 335 expands the jurisdiction the Commission would otherwise have.[22] Thus, while the Commission was correct to reject that the construction pressed by the Petitions in the public interest programming rulemaking, its conclusion that the public interest obligations should be shouldered by the licensee is even more solidly grounded for EAS alerts. Specifically, the Commission's authority to implement EAS obligations derives from its authority to "promot[e] . . . safety of life and property through the use of wire and radio communication"[23] and its responsibilities outlined in various Presidential orders and mandates.[24] Without a two-pronged

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[20] 47 U.S.C. § 335.

[21] 47 U.S.C. § 335(5)(A).

[22] *See* Public Interest Order at ¶ 20 (Commission rejected argument that "Congress is conferring jurisdiction on the Commission to impose public service obligations on direct-to-home distributors, not satellite licensees.").

[23] EAS Order at ¶ 1 (citing 47 U.S.C. § 151). The Commission also cites Sections 1, 4(i) and (o), 303(r), and 706 of the Communications Act of 1934, as amended as the basis for its jurisdiction, but none of these rules specify the entities to which the Commission's EAS rules should apply.

[24] *See Id.* at ¶ 1 n.2.

statutory definition to consider, the Commission must simply look to the entities it has authority to regulate under Title III -- its licensees.

Lack of Jurisdiction. The Petitioners are requesting a rule that the Commission would lack the jurisdiction to enforce. It is due to serendipity that lessees of FSS capacity such as EchoStar are also Commission licensees in their own right. But the Commission cannot appropriately rely on this serendipitous event in order to leap into regulating the conduct of EchoStar as a lessee of another licensee's capacity. There is no basis for such a leap in the Communications Act.

The Petitioners argue that the Commission has the authority to regulate DTH service providers to the same degree as satellite licensees by virtue of the fact that "the program distributors use radio stations (*i.e.,* receive-only earth stations) to serve their subscribers."[25] Alternatively, Petitioners argue that the Commission could establish this authority by reinstating a receive-only earth station requirement for DTH-FSS services.[26] These constructions are fanciful, and make the leap no less tenuous. The Commission would be jumping from the *reception* of communications by receive-only dishes to an obligation to embed EAS messages in *transmissions* made by satellites. In addition, in no case should the Commission be abandoning its wise restraint in the area of receive-only dishes in order to lay a foundation for the assertion of authority requested by the Petitioners. That restraint benefits millions of consumers and should not be sacrificed for the sake of jurisdictional brinksmanship.

Nor could the Commission assume that all lessees of FSS capacity will also be separate satellite licensees. This need not be the case in the future, as it has not been the case in the past. Primestar, a DTH service provider serving millions of customers from leased capacity on an SES

[25] Petition for Reconsideration at 10.

[26] *Id.*

Americom (formerly GE American Communications, Inc.) satellite, is a case in point. Primestar did not have any space station licenses, illustrating even more glaringly the jurisdictional leap that Petitioners are asking the Commission to make.

Grandfathering Request. Finally, the Petitioners argue that the Commission should grandfather satellite capacity lease contracts entered into before the effective date of the EAS rules. The theory behind this request is that the Petitioners did not have an opportunity to delegate the EAS obligations contractually to these lessees.[27] This argument must fail for a number of reasons. First, the Petitioners had notice that such an obligation might be promulgated since at least the release of the NPRM on August 12, 2004.[28] Second, the Petitioners have had ample notice of the Commission's mind-set on the question of who should bear public interest obligations since 1998, when the Commission decided that the obligations should be borne by the licensee.[29] That decision should have provided the Petitioners with ample opportunity to conceive of, and negotiate, appropriate contractual delegation clauses. Third, if the Commission were to grandfather existing contracts, it should by the same token grandfather existing DBS satellites and satellites under construction. DBS licensees had no more notice of the EAS obligations when they were entering into construction contracts for these satellites than the Petitioners had when they were entering into their existing lease agreements.

In fact, however, there is no reason for the Commission to grandfather either lease or satellite construction contracts. In recognition of the technical and operational difficulties satellite operators would face in implementing its new EAS rules, the Commission has already decided to defer

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[27] Petition for Reconsideration at 10 ("The FSS satellite operators have no means . . . of requiring EAS compliance in connection with capacity agreements that were entered into prior to the effective date of the R&O.").

[28] *Review of the Emergency Alert System,* Notice of Proposed Rulemaking, 19 FCC Rcd 15775 (2004).

[29] Public Interest Order at ¶ 21.

the effectiveness of its EAS obligations on DBS providers -- including DTH-FSS satellite operators -- until May 31, 2007.[30] The Petitioners offer no persuasive reason why consumers should wait longer.

II. CONCLUSION

For the foregoing reasons, EchoStar urges the Commission to deny the Petitioners' reconsideration request to the extent described herein.

Respectfully submitted,

/s/

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March 2, 2006

[30] EAS Order at ¶ 56.

CERTIFICATE OF SERVICE

I, Petra A. Vorwig, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 2nd day of March, 2006, I served a true copy of the foregoing **Opposition to Petition For Partial Reconsideration of PanAmAat Corporation, SES Americom, Inc., and Intelsat, Ltd.** by first class mail, postage pre-paid, a courtesy copy was emailed as indicated, upon the following:

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